

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT MUHLENKAMP,
Petitioner,
v.
ALLISON BLIZZARD,
Respondent.

NO. CV-07-0231-EFS

**ORDER DENYING PETITIONER'S
REQUEST FOR RELIEF UNDER THE
HAGUE CONVENTION ON THE CIVIL
ASPECTS OF INTERNATIONAL CHILD
ABDUCTION**

On September 12, 2007, the Court held a hearing in the above-captioned matter. Petitioner Robert Muhlenkamp appeared, represented by David B. Starks. Respondent Allison Blizzard appeared, represented by J. Michael Keyes. Before the Court was Petitioner's request for relief under the Hague Convention on the Civil Aspects of International Child Abduction. After reviewing the submitted materials and applicable authority and hearing from counsel, the Court was fully informed.

I. Procedural History

On October 18, 2006, Mr. Muhlenkamp filed a "Request for Return" of E.M. with the German Central Authority, the appropriate German agency under the Hague Convention. Circa November 2, 2006, the request was sent to the U.S. Department of State and the National Center for Missing and Exploited Children (NCMEP), the appropriate U.S. "Central Agency" under

1 the Hague Convention. NCMEP located E.M. on March 12, 2007, in Spokane.
2 On April 10, 2007, NCMEP requested Ms. Blizzard to voluntarily return
3 with E.M. to Germany to resolve custody pursuant to German law.
4 Ms. Blizzard notified NCMEP on April 13, 2007, that she would not
5 voluntarily return E.M. to Germany.

6 On July 17, 2007, Mr. Muhlenkamp filed his petition with this Court
7 to determine whether E.M. was "wrongfully removed or retained" from
8 Germany and should be returned to Germany pursuant to the Hague
9 Convention. This Court has already dispensed with several of
10 Mr. Muhlenkamp's requests for relief. Remaining requests for this
11 Court's decision are: (1) "an Order directing the prompt return of [E.M.]
12 to her habitual residence of Germany"; (2) "an Order directing
13 Ms. Blizzard to pay Mr. Muhlenkamp's legal costs and fees"; and (3) "any
14 such further relief as justice and its cause may require."

15 Also in the spring of 2007, Mr. Muhlenkamp began legal proceedings
16 in Germany to regain custody of E.M. Apparently, without any notice to
17 Ms. Blizzard or opportunity to defend herself, the Bayreuth Local Court
18 entered a judgment finding Ms. Blizzard "wrongfully removed" E.M. from
19 Germany to the United States based on a "plausible" showing of facts by
20 Mr. Muhlenkamp.

21 **II. Findings of Fact**

22 The Court makes the following findings of fact:

23 E.M. was born to Mr. Muhlenkamp and Ms. Blizzard on April 29, 2004,
24 in Duisburg, Germany. Shortly thereafter, the parties obtained a U.S.
25 birth certificate, a U.S. passport, and a U.S. social security number,
26 all for E.M. The parties repeatedly discussed an eventual relocation to

1 the United States. Mr. Muhlenkamp and Ms. Blizzard married on June 8,
2 2005, in Duisburg. Mr. Muhlenkamp is a musician and a citizen of
3 Germany. Ms. Blizzard is an academic professor, a born citizen of the
4 United States, and later became a resident of Germany, where she was a
5 resident until June 2006. Mr. Muhlenkamp, Ms. Blizzard, and E.M. moved
6 to Bayreuth, Germany, in August or September of 2005.

7 Prior to 2006, Ms. Blizzard's mother lived in Germany. At some
8 point Ms. Blizzard's mother became ill with a physically degenerative
9 disease. In order to receive care, Ms. Blizzard's mother moved from
10 Germany to Mesa, Arizona, in January 2006. The disease was of such a
11 character that at certain onsets Ms. Blizzard's mother would irreparably
12 lose control of certain extremities. On February 22, 2006, Ms. Blizzard
13 drafted a permission letter allowing her to travel with E.M. to Mesa,
14 Arizona, from February 25, 2006, to March 20, 2006, which Mr. Muhlenkamp
15 signed and was notarized. During this period, Ms. Blizzard and E.M.
16 visited Ms. Blizzard's mother, who was in declining health, in Arizona
17 at the address contained in the consent letter.

18 In the spring of 2006, in addition to her sick mother, Ms. Blizzard
19 was also focused on finding a career position outside of Germany. Her
20 two-year term as a professor at a university in Bayreuth was to expire
21 soon and, under local German law, Ms. Blizzard could not continue
22 employment in the Bayreuth area. Ms. Blizzard explored new positions in
23 a number of countries, including the United States. Mr. Muhlenkamp and
24 Ms. Blizzard discussed her prospects, recognizing Ms. Blizzard would
25 likely take an employment position outside of Germany. They also
26 recognized that E.M. would be best provided for by Ms. Blizzard as she

1 would have more income. In late April and early May of 2006,
2 Ms. Blizzard went alone to Spokane, Washington, for a job interview at
3 Spokane Falls Community College. Ms. Blizzard had received her Associate
4 of Arts Degree from Spokane Falls many years before. Ms. Blizzard was
5 interviewing for a position held by her former professor for the prior
6 twenty years. Upon arriving at the train station in Frankfurt, Germany,
7 on May 1, 2006, for her final train leg to Beyreuth, Ms. Blizzard called
8 Mr. Muhlenkamp to inform him she had arrived a day early. During this
9 phone call, Mr. Muhlenkamp told Ms. Blizzard that he wished to separate
10 from her.

11 The testimony and record indicates, prior to April 2006,
12 Mr. Muhlenkamp was a loving father who watched over his child E.M. daily.
13 For the first few months after E.M. was born, Ms. Blizzard suffered an
14 illness which made simple tasks difficult; therefore, Mr. Muhlenkamp
15 became the primary care giver. When Ms. Blizzard regained her health and
16 returned to steady employment as a professor at a university in Bayreuth,
17 Ms. Blizzard took over many of the parenting responsibilities.
18 Ms. Blizzard soon assumed most of the parenting responsibilities as
19 Mr. Muhlenkamp suffered from sleep apnea, depriving Mr. Muhlenkamp of
20 rest and resulting in sluggish mornings.

21 Leading up to April 2006, Mr. Muhlenkamp slowly adjusted E.M. to a
22 daycare facility by initially staying with E.M. for a few minutes, then
23 an hour, and finally not staying at all. In April 2006, E.M. began
24 attending daycare full time and continued through June 2006. With E.M.
25 in daycare, Mr. Muhlenkamp had more time to search for employment and to
26 practice with a rock band he recently joined.

1 When Ms. Blizzard returned from the Spokane Falls interview,
2 Mr. Muhlenkamp moved out of their shared apartment into his own
3 apartment. He expressed no desire to visit Ms. Blizzard or to provide
4 care for E.M. between May 1 and June 12, 2006. E.M. remained in the care
5 of Ms. Blizzard and continued full-time daycare until June 12, 2006. On
6 or about May 23, 2006, Ms. Blizzard informed Mr. Muhlenkamp that Spokane
7 Falls Community College had offered her a job which he understood she
8 would accept. Mr. Muhlenkamp then signed a letter terminating the lease
9 on the marital apartment.

10 On May 5, 2006, Ms. Blizzard drafted a permission letter to allow
11 her "to travel internationally and remain abroad indefinitely with
12 [E.M.]," which Mr. Muhlenkamp signed and was notarized. On June 7, 2006,
13 at Mr. Muhlenkamp's request, Mr. Muhlenkamp and Ms. Blizzard met with
14 Hubert Wattenbach, a social worker employed by the city of Bayreuth.
15 Mr. Wattenbach testified that Mr. Muhlenkamp was concerned whether E.M.
16 would be returned to him if Ms. Blizzard died while living with E.M. in
17 the United States. Therefore, as of June 7, 2006, Mr. Muhlenkamp
18 understood E.M. was to relocate to the United States because her mother,
19 Ms. Blizzard, had employment in the United States.

20 On June 12, 2006, Ms. Blizzard left with E.M. for the United States
21 without any prior notice to Mr. Muhlenkamp. On the train to the airport
22 in Frankfurt, Germany, Ms. Blizzard and E.M. encountered Ralph Puffer,
23 a family acquaintance who knew E.M. Because he was merely an
24 acquaintance, Ms. Blizzard did not disclose they were going to Arizona
25 and told him they were visiting a friend in Frankfurt. After arriving
26 in the United States, Ms. Blizzard had her belongings shipped to her.

1 When Ms. Blizzard and E.M. arrived in Phoenix, Arizona, Ms. Blizzard
2 attempted to call Mr. Muhlenkamp several times in order to tell him their
3 whereabouts, finally connecting with him on June 14, 2006, after 25 phone
4 calls. During the phone call, Ms. Blizzard impressed upon Mr. Muhlenkamp
5 that she would return to Germany within two weeks. In an email sent to
6 Ms. Blizzard on June 16, 2006, Mr. Muhlenkamp expressed displeasure that
7 Ms. Blizzard had taken E.M. to the United States without his knowledge.
8 Mr. Muhlenkamp felt he had lost two weeks of time with E.M. prior to her
9 final departure for the United States with Ms. Blizzard and pleaded with
10 Ms. Blizzard, "please promise me that you will not just leave [E.M.] in
11 America." On June 22, 2006, Mr. Muhlenkamp sent another email to
12 Ms. Blizzard, demanding Ms. Blizzard inform him of when she would be
13 returning with E.M. so that he may "make use of the time I have left with
14 [E.M.] in Germany." In this email, Mr. Muhlenkamp expressed his belief
15 that a continued stay beyond two weeks was "not legal."

16 On June 26 and 27, 2006, Mr. Muhlenkamp sent third and fourth
17 emails, warning Ms. Blizzard that he was considering filing an action
18 against her in Germany with the Youth Services Office. On July 3, 2007,
19 Mr. Muhlenkamp sent another email stating, "When you are back here, we
20 can calmly settle everything that needs to be addressed." Based on the
21 clear and unambiguous understanding by Mr. Muhlenkamp that Ms. Blizzard
22 would be returning with E.M. to Germany to finalize agreement on future
23 visitation with E.M. and on other parental rights and responsibilities,
24 the Court finds Mr. Muhlenkamp intended, and never waived the right, to
25 determine such custody rights of E.M. in Germany under German law.

1 In reaction to the July 3 email, Ms. Blizzard decided to not talk
2 by phone to Mr. Muhlenkamp, although she did allow Mr. Muhlenkamp to talk
3 to E.M., who was two years old at the time. On August 14, 2006,
4 Mr. Muhlenkamp revoked his previous permission letter. This revocation
5 letter was sent to Ms. Blizzard's sister Billie Zundel in Mesa, Arizona.
6 At some point in August or September of 2006, Ms. Blizzard moved to
7 Spokane, Washington, with E.M., where they have resided since. On August
8 23 and 28, 2006, Mr. Muhlenkamp emailed Ms. Blizzard requesting she
9 provide information regarding expected departure for Spokane and
10 information about the daycare that E.M. would be enrolled.
11 Mr. Muhlenkamp infrequently called E.M. to talk with her, partly due to
12 his employment hours, necessitating him to call between the hours of
13 11:00 p.m. PST and 1:45 p.m. PST, times when E.M. was either sleeping or
14 in daycare. At one point Mr. Muhlenkamp expressed an interest in
15 visiting E.M. for Christmas in Spokane, and Mr. Muhlenkamp's mother told
16 Ms. Blizzard she would provide some money for Mr. Muhlenkamp to make the
17 trip. The money being insufficient, Mr. Muhlenkamp did not come to
18 Spokane.

19 At the September 12, 2007, hearing, testimony by E.M.'s current
20 daycare provider and by Ms. Blizzard indicated the following facts. E.M.
21 is performing at two to three age levels above her own. E.M. is
22 well-liked by her peers at the daycare and has a strong core of friends.
23 Ms. Blizzard routinely takes E.M. to community cultural events. E.M. has
24 many relatives in the Northwest and in Arizona, whose homes Ms. Blizzard
25 and E.M. often spend holidays. Based on these facts, the Court finds
26

1 E.M. has settled in Spokane, Washington, as defined by the Hague
2 Convention, for reasons stated below.

3 **III. Applicable Law and Analysis**

4 The primary purpose of the Hague Convention is "[1] to secure the
5 prompt return of children wrongfully removed to or retained in any
6 Contracting State; and [2] to ensure that rights of custody and of access
7 under the law of one Contracting State are effectively respected in other
8 Contracting States." *Id.* art. 3. "It is thus legitimate to assert that
9 the two objects of the Convention - the one preventative, the other
10 designed to secure the immediate reintegration of the child into its
11 habitual environment - both correspond to a specific idea of what
12 constitutes the 'best interests of the child.'" Elisa Perez-Vera,
13 Explanatory Report, ¶ 25, in HAGUE CONFERENCE PRIVATE INTERNATIONAL LAW, ACTS AND
14 DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 426 (1982).¹ Thus, the
15 interest at the heart of the act is not that of the parents, but of the
16 child. Accordingly, a judicial proceeding to determine the appropriate
17

18 ¹ Elisa Perez-Vera was the official Hague Conference reporter. *Mozes*
19 *v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001). The Hague Convention
20 recognize the Perez-Vera report "'as the official history and commentary
21 on the Convention and is a source of background on the meaning of the
22 provisions of the Convention available to all States becoming parties to
23 it.'" Legal Analysis of the Hague Convention on the Civil Aspects of
24 International Child Abduction, 51 Fed. Reg. 10503 (1986); *see also Mozes*,
25 239 F.3d at 1070; *Shalit v. Coppe*, 182 F.3d 1124, 1127-28 (9th Cir.
26 1999).

1 residency of a child between two nations should be fair and efficient
2 enough to not cause undue strain on the child. The Hague Convention has
3 been implemented by Congress through the International Child Remedies Act
4 (ICARA), 42 U.S.C. §§ 11601-11611. The Hague Convention is not meant for
5 deciding the "merits of the underlying custody dispute but whether the
6 child should be returned to a country for custody proceedings under that
7 country's domestic law." *Papakosmas v. Papakosmas*, 483 F.3d 617, 621
8 (9th Cir. 2007) (citing *Holder v. Holder (Holder II)*, 392 F.3d 1009, 1013
9 (9th Cir. 2004)).

10 **A. Jurisdiction**

11 The Court must first determine whether it has jurisdiction to hear
12 the case. Hague Convention provides, "[t]he judicial or administrative
13 authorities of Contracting States shall act expeditiously in proceedings
14 for the return of children." Hague Conv. art. 11. The language of the
15 preceding articles indicate that "judicial or administrative authorities
16 of Contracting States" refers to the courts of the country where the
17 child currently resides, not in the country where the child may have been
18 "wrongfully removed or retained [therefrom]." *Id.* art. 9-10. Hague
19 Convention covers children under the age of 16. *Id.* art. 4.

20 E.M. was removed from Germany to the United States. E.M. is now 3
21 years old, within the Hague Convention's age range. Thus, this Court is
22 the "judicial or administrative authority" referred to in Article 11 and
23 is an appropriate body to render a decision regarding whether E.M. was
24 wrongfully removed or retained from Germany.

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B. Petitioner's Request for Relief

In determining the appropriate location of a child under the Hague Convention, the threshold issue is whether the removal or retention of the child was wrongful. *Holder II*, 392 F.3d at 1014. The Bayreuth Local Court may have superseded this Court in its determination that Ms. Blizzard wrongfully removed E.M. (Ct. Rec. 1, Ex. P: *In Sachen: Muhlenkamp v. Blizzard* (Mar. 27, 2007).) Thus, this Court is confronted with the question of whether the Court must respect the Bayreuth Local Court's decision and enter an order compelling the return of E.M.

1. Full Faith and Credit: Bayreuth Local Court

United States courts are to give full faith and credit "to the judgment of any other . . . court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter." 42 U.S.C. § 11603(g). The Bayreuth Local Court entered an order and "Certificate of Wrongfulness" declaring the removal of E.M. was "wrongful" within the meaning of the Hague Convention. (Ct. Rec. 1, Ex. P.) Article 15 of the Hague Convention allows:

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Hague Conv. art. 15. Here, the question of the wrongfulness of E.M.'s detention has already been decided by the Bayreuth Local Court. (Ct.

1 Rec. 1, Ex. P.) Although the typical procedure under Article 15 would
2 be for this Court to request a determination of wrongfulness by a German
3 court, because the Bayreuth Local Court has already made a determination,
4 this Court must determine whether to give the decision full faith and
5 credit under ICARA, 42 U.S.C. § 11603(g).

6 Several concerns arise from the Bayreuth Local Court's decision.
7 First, Ms. Blizzard never received notice of this proceeding (Ct. Rec.
8 5: Blizzard Resp. ¶ 14), nor did the Bayreuth Local Court or
9 Mr. Muhlenkamp ever attempted to notify Ms. Blizzard of the custody
10 proceeding and Hague Convention issue. Second, the Bayreuth Local
11 Court's requisite level of burden of proof is below the standard mandated
12 by ICARA and the Hague Convention. That court simply stated that
13 Mr. Muhlenkamp had "shown *plausibly* by submission of an affidavit dated
14 October 18, 2006, and the notarized revocation of travel permission dated
15 August 14, 2006 [sic] that he has joint right of custody of [E.M.]," and
16 therefore the court made a finding of "wrongfulness" pursuant to the
17 Hague Convention. (Ct. Rec. 1, Ex. P (emphasis added.)) However, the
18 requisite burden of proof is more than "plausible"; a petitioner must
19 "establish by a preponderance of the evidence" the child was wrongfully
20 removed. 42 U.S.C. § 11603(e)(1)(a).

21 Because no notice was made to Ms. Blizzard of the proceeding and the
22 Bayreuth Local Court applied a burden of proof substantially less than
23 the requisite burden, this Court does not give full faith and credit to
24 the Bayreuth Local Court decision.

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1 **2. Wrongful Removal or Retention**

2 The petitioner bears the burden of proving the removal or retention
3 was wrongful by a preponderance of the evidence. ICARA, 42 U.S.C.
4 § 11603(e). The Hague Convention provides that the removal or retention
5 of a child is "wrongful" when:

6 (a) it is in breach of rights of custody attributed to
7 a person, an institution or any other body, either
8 jointly or alone, under the law of the State in which
the Child was habitually resident immediately before
the removal or retention; and

9 (b) at the time of removal or retention those rights
10 were actually exercised, either jointly or alone, or
11 would have been so exercised but for the removal or
retention.

12 Hague Conv. art. 3; see also *Papakosmas*, 483 F.3d at 622. The Ninth
13 Circuit requires four questions to be answered in applying this Hague
14 Convention provision:

15 (1) When did the removal or retention at issue take
16 place? (2) Immediately prior to the removal or
17 retention, in which state was the child habitually
18 resident? (3) Did the removal or retention breach the
rights of custody attributed to the petitioner under
the law of habitual residence? (4) Was the petitioner
exercising those rights at the time of the removal or
retention?

19
20 *Papakosmas*, 483 F.3d at 622 (citing *Mozes*, 239 F.3d at 1070); see also
21 *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1182 (9th Cir. 2002).

22 **a. Time of Removal and Retention**

23 Removal of E.M. from Germany occurred on June 12, 2006. (Ct. Rec.
24 5: Blizzard Resp. ¶ 12.) Retention, if wrongful, occurred after the
25 two-week window Mr. Muhlenkamp believed Ms. Blizzard would be in the
26 United States. Thus, retention occurred on June 26, 2006.

1 **b. Location of Habitual Residence**

2 The Hague Convention provides no definition of "habitual residence."
 3 *Mozes*, 239 F.3d at 1070. The Perez-Vera Report stated that the
 4 Convention regarded the question of "habitual residence" as one of pure
 5 fact. Perez-Vera Report ¶ 66. However, the Ninth Circuit stated that
 6 the initial factual focus of the inquiry "ultimately . . . rests on a
 7 legal determination." *Holder II*, 392 F.3d at 1015; *Mozes*, 239 F.3d at
 8 1073. The Ninth Circuit set an analytical framework to determine a
 9 child's habitual residence:

10 First, in order to acquire a new habitual residence,
 11 there must be a "settled intention to abandon the one
 12 left behind." . . . Second, there must be (A) an
 "actual 'change in geography,'" combined with (B) the
 "passage of 'an appreciable period of time.'"

13 *Holder II*, 392 F.3d at 1015 (citations omitted; quoting *Mozes* 239 F.3d at
 14 1075-78). This test is unnecessary here. Although E.M. possessed a U.S.
 15 social security card, U.S. birth certificate, and U.S. passport (Ct. Rec.
 16 5, Ex. 1-3), prior to the removal, E.M. was born and lived in Germany her
 17 entire life (Ct. Rec. 5: Blizzard Resp. ¶ 4). Therefore, at the time of
 18 removal, the Court concludes E.M.'s habitual residence was in Germany,
 19 though it is certain that the parties agreed that Ms. Blizzard was
 20 relocating to the United States with E.M. to begin her job in Spokane,
 21 Washington.

22 **c. Rights of Custody**

23 Under the Hague Convention, rights of custody "include rights
 24 relating to the care of the person of the child and, in particular, the
 25 right to determine the child's place of residence." Hague Conv. art. 5.
 26 German law gives both parents equal custody of a child. *Bürgerliches*

1 Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, §§ 1621 ¶ 1, 1627; see *Shealy*
2 *v. Shealy*, 295 F.3d 1117, 1124 (10th Cir. 2002); *Friedrich v. Friedrich*,
3 78 F.3d 1060, 1064 (6th Cir. 1996); see also *Kufner v. Kufner*, 480
4 F. Supp. 2d 491, 508 (D.R.I. 2007). "The violation of a *single* custody
5 right suffices to make removal of a child wrongful." *Furnes v. Reeves*,
6 362 F.3d 702, 714-15 (11th Cir. 2004) (citing Hague Conv. art. 3). "Just
7 as there is no requirement in the Convention that a custody right be
8 exercised exclusively by the parent seeking return, there is no
9 requirement that the right be exercised predominantly by that parent."
10 *Id.* at 716.

11 While the potential number of custody rights are much broader under
12 the Hague Convention than a particular jurisdiction's law, the Second
13 Circuit has held "rights of access do not constitute rights of custody
14 within the meaning of the Hague Convention" *Croll v. Croll*, 229
15 F.3d 133, 135 (2d Cir. 2000). Rights of access "include the right to
16 take a child for a limited period of time to a place other than the
17 child's habitual residence." Hague Conv. art. 5(b).

18 This case presents us with the question of whether Mr. Muhlenkamp
19 retained merely a right of access, rather than rights of custody, when
20 he agreed to let Ms. Blizzard take E.M. to the United States. On May 5,
21 2006, Mr. Muhlenkamp signed a general letter written by Ms. Blizzard
22 giving his "express permission for Allison Blizzard to travel
23 internationally and remain abroad indefinitely with [E.M.]." (Ct. Rec.
24 1, Ex. K.) Mr. Muhlenkamp and Ms. Blizzard disagree as to what
25 "indefinitely" meant. Ms. Blizzard argued "indefinitely" meant a
26 complete and total release of custodial rights. Mr. Muhlenkamp argued

1 "indefinitely" was used because no date was established as to when
2 Ms. Blizzard would leave for the United States in order to visit her sick
3 mother. Mr. Muhlenkamp also argued the rather open-ended word
4 "internationally" was used because flight paths to the United States
5 might go through any number of nations. Thus, according to
6 Mr. Muhlenkamp, he gave permission only for Ms. Blizzard to travel and
7 remain in the United States with E.M. in order to visit her sick mother,
8 not to remain with E.M. forever in the United States. Almost immediately
9 upon E.M.'s arrival in Arizona, emails from Mr. Muhlenkamp to
10 Ms. Blizzard indicate Mr. Muhlenkamp believed Ms. Blizzard would be
11 returning to Germany within a couple of weeks in order to make a final
12 custody rights determination. (Ct. Rec. 19, Ex. 9, 11, 12, 14.) When
13 Mr. Muhlenkamp became concerned that Ms. Blizzard would not return, he
14 threatened legal action. *Id.* From these facts, Mr. Muhlenkamp retained
15 the right to determine custody rights, including parental-decision making
16 roles and the right of visitation, in Germany. Choice of law can have
17 a substantial impact on what custody rights are ultimately conferred to
18 either parent. Additionally, the right to have a custody proceeding
19 within one's own country substantially lessens the economic burden on
20 that parent. These rights are substantially more than a "right of
21 access," which is not a custodial right. *Croll*, 229 F.3d at 135. For
22 this reason, the Court concludes Mr. Muhlenkamp possessed rights of
23 custody at the time of removal.

24 **d. Exercise of Custodial Rights**

25 Mr. Muhlenkamp demonstrated his right to a custodial proceeding at
26 the first instance when he believed Ms. Blizzard was acting in violation

1 of the right. Mr. Muhlenkamp did not know of Ms. Blizzard's intention
2 on June 12, 2006, the time of removal, and therefore did not exercise his
3 custodial right at the time of removal. However, when Mr. Muhlenkamp
4 became aware of Ms. Blizzard's intent, he exercised his rights and did
5 not acquiesce to the retention of E.M. in the United States. Therefore,
6 this Court concludes wrongful retention occurred on June 26, 2006.

7 **3. Exceptions**

8 Articles 12 and 13 of the Hague Convention provide three exceptions
9 to a mandated return after a court makes a determination of wrongful
10 removal or retention: grave risk of harm to the child, petitioner's
11 consent to removal or acquiescence to retention, and a one-year
12 limitation for bringing suit.

13 **a. Grave Risk of Harm**

14 A court may deny return of a child to its habitual residence if the
15 court finds doing so would present a grave risk of harm to the child.
16 Hague Conv. art. 13(b). Respondent waived this exception at trial.
17 Thus, this Court need not address the grave risk exception.

18 **b. Consent or Acquiescence**

19 The second exception provides, "[The court] is not bound to order
20 the return of the child if the [petitioner] consented to or subsequently
21 acquiesced in the removal or retention." Hague Conv. art. 13(a). Under
22 the above analysis for wrongful removal and retention, this Court
23 determined Mr. Muhlenkamp agreed to permit Ms. Blizzard to travel and
24 remain with E.M. in the United States in order to visit Ms. Blizzard's
25 sick mother in Arizona. After Ms. Blizzard remained in the United States
26 beyond two weeks and retained E.M., Ms. Blizzard exceeded

1 Mr. Muhlenkamp's consent. Mr. Muhlenkamp's emails shortly following the
2 removal clearly indicate he never acquiesced to the retention. (Ct. Rec.
3 19, Ex. 9, 11, 12, 14, 17.) Thus, this Court concludes that the consent
4 exception does not apply.

5 **c. One-Year Limitation**

6 If the petition was filed one year from the time of the alleged
7 wrongful removal or retention and the child has since "settled into [her]
8 new environment," then the court must not order the return of the child.²
9 Hague Conv. art. 12. This Court must answer when the one-year limitation
10 began to run, whether the limitation was equitably tolled, when the
11 filing occurred, and, if necessary, whether E.M. has settled.

12 **i. When did the one-year limit begin to run?**

13 The one-year limit runs when the petitioner should have known of the
14 wrongful removal or retention. See *Furnes v. Reeves*, 362 F.3d 702, 723
15 (11th Cir. 1998) (upholding application of the doctrine of equitable
16

17 ² The Hague Convention states:

18 Where a child has been wrongfully removed or retained
19 in terms of Article 3 and, at the date of the
20 commencement of the proceedings before the judicial
21 or administrative authority of the Contracting State
22 where the child is, a period of less than one year
has elapsed from the date of the wrongful removal or
retention, the authority concerned shall order the
return of the child forthwith.

23 The judicial or administrative authority, even where
24 the proceedings have been commenced after the
25 expiration of the period of one year referred to in
the preceding paragraph, shall also order the return
26 of the child, unless it is demonstrated that the
child is now settled in its new environment.

Hague Conv., art 12 (emphasis added).

1 tolling under the Hague Convention). Here, the first instance indicating
2 Petitioner's knowledge of wrongful retention might occur is the email
3 sent by Mr. Muhlenkamp on June 22, 2006, indicating he believed a stay
4 in the United States beyond two weeks was "not legal." (Ct. Rec. 19,
5 Ex. 11.) Ms. Blizzard and E.M. left Germany on June 12, 2006. Thus, the
6 Court concludes the wrongful retention began when the two weeks ran on
7 June 26, 2006.

8 **ii. Was the one-year limit tolled?**

9 The one-year limit can be equitably tolled if the respondent hides
10 the child's location from the petitioner. *Furnes*, 362 F.3d at 723.
11 Here, although Ms. Blizzard did not provide her address to Mr. Muhlenkamp
12 upon request, failure to provide information in this instance falls far
13 short of secreting away of the child. Ms. Blizzard called Mr. Muhlenkamp
14 immediately upon arrival in Arizona. Mr. Muhlenkamp possessed the
15 address of Ms. Blizzard's sister in Arizona. (Ct. Rec. 19, Ex. 35:
16 Revocation Letter sent to Ms. Blizzard care of Billie Zundel.)
17 Mr. Muhlenkamp was aware of Ms. Blizzard's move to Spokane.
18 Mr. Muhlenkamp was able to obtain both Ms. Blizzard's personal post
19 office address and work address at Spokane Falls. Ms. Blizzard testified
20 that Mr. Muhlenkamp sent a package to Ms. Blizzard's home address.
21 Mr. Muhlenkamp possessed regular telephonic and email communication with
22 Ms. Blizzard and E.M. These facts fall far short of hiding the child.
23 The Court concludes equitable tolling is not warranted.

24 **iii. When was the filing made?**

25 The petition must be filed with the court of record, not the Central
26 Authority, to file within the one-year limitation. *Wojcik v. Wojcik*, 959

1 F. Supp. 413, 420 (E.D. Mich. 1997); *see also In re D.D.*, 440 F. Supp. 2d
2 1283, 1298 (M.D. Fla. 2006); *Belay v. Getachew*, 272 F. Supp. 2d 553, 561
3 (D. Md. 2003). Here, Mr. Muhlenkamp filed his petition to this Court on
4 July 17, 2007. Wrongful retention began on June 26, 2006. The Court
5 concludes the filing occurred outside the one-year limitation.

6 **iv. Was E.M. settled?**

7 The burden of demonstrating settlement rests with the respondent.
8 Hague Conv. art. 12. This Court has broad discretion in finding whether
9 settlement has occurred. The Ninth Circuit has stated:

10 The question whether a child is in some sense
11 "settled" in its new environment is so vague as to
12 allow findings of habitual residence based on
13 virtually any indication that the child has generally
14 adjusted to life there. Further, attempting to make
15 the standard more rigorous might actually make matters
16 worse, as it could open children to harmful
17 manipulation when one parent seeks to foster
18 residential attachments during what was intended to be
19 a temporary visit - such as having the child profess
20 allegiance to the new sovereign.

21 *Mozes*, 239 F.3d at 1079. The Ninth Circuit provides a dim light as to
22 what factors are pertinent: "[S]ome courts regard the question whether
23 a child is doing well in school, has friends, and so on, as more
24 straightforward and objective" *Id.*

25 Here, E.M. is performing at two to three age levels above her own.
26 E.M. also is well-liked and has a strong core of friends. Ms. Blizzard
routinely takes E.M. to community cultural events. E.M. has many
relatives in the Northwest and in Arizona, where they often spend
holidays. Thus, this Court finds E.M. has settled. Because E.M. has
settled, the one-year limitation exception applies. Therefore, even
though the Court finds Ms. Blizzard wrongfully retained E.M. outside of

1 Germany, the Court concludes E.M. shall remain with Ms. Blizzard in the
2 United States.

3 **IV. Conclusions of Law**

4 Based on the foregoing analysis, the Court makes the following
5 conclusions of law. The Bayreuth Local Court's decision is not afforded
6 full faith and credit. Mr. Muhlenkamp retained custody rights.
7 Ms. Blizzard wrongfully retained E.M. in the United States from Germany.
8 Mr. Muhlenkamp filed his petition past the one-year limitation imposed
9 by the Hague Convention. Because the Court finds E.M. settled in
10 Spokane, Washington, the Court concludes E.M. shall not be returned to
11 Germany.

12 **V. Custody Proceeding**

13 As already mentioned, this Court lacks jurisdiction to hear a
14 custody proceeding. Additionally, while the ICARA allows a court to
15 impose provisional remedies "to protect the well-being of the child
16 involved or to prevent the child's further removal or concealment," IRACA
17 only establishes the authority *prior to* "final disposition of the
18 petition." 42 U.S.C. § 11604. The district court cases that have found
19 in favor of the respondent clearly demonstrate that a temporary order on
20 custody should not be issued. *Abbott v. Abbott*, 495 F. Supp. 2d 635
21 (W.D. Tex. 2007); *Stevens v. Stevens*, 499 F. Supp. 2d 891 (E.D. Mich.
22 2007); *Baran v. Beaty*, 479 F. Supp. 2d 1257 (S.D. Ala. 2007); *Van*
23 *Drissche v. Ohio-Esezeoboh*, 466 F.Supp. 2d 828 (S.D. Tex. 2006); *In re*
24 *Kim*, 404 F. Supp. 2d 495 (S.D. N.Y. 2005); *Silvestri v. Oliva*, 403
25 F. Supp. 2d 378 (D. N.J. 2005). Thus, this Court does not enter a
26 temporary order on custody. Custody shall be determined either in the

1 ongoing divorce proceeding between Mr. Muhlenkamp and Ms. Blizzard in
2 Arizona or in a separate child custody proceeding to be commenced.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Petitioner's remaining Requests for Relief (**Ct. Rec. 9 ¶ 22**)
5 are **DENIED**.

6 2. Respondent may obtain her and E.M.'s passports from the Clerk's
7 Office.

8 3. The parties' Stipulated Motion to Extend the Temporary
9 Restraining Order (**Ct. Rec. 23**) is **DENIED AS MOOT**.

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter
11 this Order and to provide copies to all counsel.

12 **DATED** this 23rd day of October 2007.

13
14 S/Edward F. Shea
15 EDWARD F. SHEA
United States District Judge

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